Supreme Court, U.S.
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No. 95-1357

In The

Supreme Court of the United States

October Term, 1995

LEROY JONES and PAULA FAY JONES,

Petitioners,

vs.

ALFRED GARCIA and ROSE A. GARCIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the post-petition foreclosure sale is voidable rather than void *ab initio*, and fits the statutory exception for good faith purchasers provided in 11 U.S.C.§ 549(c).

PARTIES TO THE PROCEEDINGS

Petitioners Leroy and Paula Faye Jones are Chapter 13 Debtors in bankruptcy. Respondents Alfred and Rose A. Garcia are owners of the property who foreclosed on the Petitioners' residence.

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Respondents, Leroy Jones and Paula Fay Jones, respectfully request that this Court deny the petition for Writ of Certiorari which seeks review of the Fifth Circuit's opinion below, which is reported at 63 F.3d 411 (5th Cir. 1995), and which is reprinted in the petition for certiorari at Appendix B.

ADDITIONAL STATUTE INVOLVED

11 U.S.C. § 542(c):

> Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

STATEMENT OF THE CASE

A. Procedural History

Petitioners filed their current Chapter 13 bankruptcy on May 23, 1994. Having received no notice of the Petitioners' current bankruptcy filing, Respondents held a foreclosure sale on June 7, 1994. Respondents filed their Motion for Relief from Automatic Stay on July 21, 1994. The hearing on said Motion was held in the United States Bankruptcy Court for the Eastern District of Texas, Beaumont Division, on September 14, 1994. The Bankruptcy Court issued its opinion and order granting the Respondents relief from the automatic stay on October 4, 1994.

The Petitioners filed their notice of appeal to the United States District Court for the Eastern District of Texas, Beaumont Division, on October 6, 1994. On October 13, 1994, Petitioners filed their emergency motion for stay of order pending appeal. The Bankruptcy Court entered its order denying emergency motion for stay of order pending appeal on October 14, 1994. The District Court entered its judgment affirming the Bankruptcy Court on February 3, 1995. Petitioners subsequently appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. On September 11, 1995, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming the judgment of the United States District Court for Eastern District of Texas, Beaumont Division. On October 25, 1995, the Fifth Circuit of Appeals entered its order denying Petitioners' Motion for Rehearing, and Petitioners then filed a Petition for Writ of Certiorari in this Court on January 23, 1996.

B. Facts

The Petitioners bought the property at issue from the Respondents in March 1989. The Petitioners first defaulted on their obligation to Respondents in 1991, and foreclosure proceedings were then begun. The Petitioners filed their first Chapter 13 petition on June 20, 1991, as Cause Number 91-10690-S to stay Respondents' foreclosure proceeding. Said plan provided that the Respondents be paid outside the plan.

The Petitioners again defaulted, under the above confirmed plan, in March of 1994, and foreclosure proceedings were again commenced. The Petitioners filed a motion to dismiss their confirmed Chapter 13 plan on May 5th, 1994. Said motion to dismiss was served on Respondents' counsel, Thomas J. Sibley, by Petitioners' counsel Frank J. Maida.

On May 16, 1994, Respondents accelerated the debt. Petitioners' second Chapter 13 petition was filed on May 23, 1994. Although Respondents' counsel had received notice of Petitioners' motion to dismiss Chapter 13 case and had mailed numerous default and foreclosure notices to Petitioners, no notice of the refiling of Petitioners' Chapter 13 bankruptcy was provided to Respondents' counsel by Frank Maida. Additionally, no notice of Petitioners' refiling of their Chapter 13 bankruptcy proceeding was provided to Respondents, notwithstanding that the Respondents' proper address was evidenced on all of the loan documents and that Petitioners had been making payments to Respondents' true and proper address for years. Furthermore, Petitioners failed to file a notice of their second bankruptcy proceeding in the real property records of Jefferson County as required by § 549(c) of the Bankruptcy Code.

Having received no notice of the Petitioners' second bankruptcy filing, Respondents held a properly noticed foreclosure sale on June 7, 1994, and the property was sold to Respondents by properly filed trustee's deed for $28,000.00.

Respondents filed a motion for relief from automatic stay on July 21, 1994, to commence an action for forcible entry and detainer against the Petitioners, based on the grounds that the foreclosure was valid and that Respondents held valid title to the subject property.

After hearing on September 14, 1994, the Bankruptcy Court issued its opinion and order on October 4, 1994, granting the Respondents relief from the automatic stay to allow Respondents to proceed with a forcible and entry detainer action.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT CORRECTLY HELD THAT THE POST-PETITION FORECLOSURE SALE WAS VOIDABLE RATHER THAN VOID *AB INITIO*, THEREBY ALLOWING VALIDATION OF THE TRANSACTION UNDER 11 U.S.C. § 549(c).

Petitioners' argument that the "majority of circuits" which have considered the issue have found post-petition transactions to be void *ab initio* overlooks the fact that, even those courts which have held that acts in violation of the automatic stay under 11 U.S.C. § 362 are void *ab initio* have reached the same result as those courts which have held that such acts are merely voidable because those courts have allowed retroactive relief on statutory or equitable grounds, thereby validating the post-petition transaction. In fact, it is illustrative that *none* of the cases cited by Petitioners which found post-petition transactions to be void *ab initio*[1] without validating the post-petition transaction dealt with the statutory exceptions which are at issue in this case, *i.e.*, 11 U.S.C. §§ 549(c) and 542(c). Furthermore, many of the cases

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1. *In re Rose*, 113 B.R. 534 (W.D. Mo. 1990); *Matthews v. Rosene*, 739 F.2d 249 (1984); *In re Rhodes*, 147 B.R. 492 (Bkrtcy W.D. Ark. 1992); *In re Stacy*, 21 B.R. 49 (Bkrtcy. W.D. Va. 1982); *Thomas v. Miller*, 906 S.W.2d 260 (Tex. App.- Texarkana 1995); *In re Garcia*, 109 B.R. 335 (N.D. Ill. 1989); *In re National Cattle Congress*, 179 B.R. 588 (Bkrtcy N.D. Iowa 1995); *In re Omni Graphics*, 119 B.R. 641 (Bkrtcy E.D. Wis. 1990); *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995); *Kalb v. Feuerstein*, 308 U.S. 433 (1940); *In re Estate of Barefoot*, 43 B.R. 608 (Bkrtcy E.D. N.C. 1984); *In re Clarkson*, 168 B.R. 93 (Bkrtcy D.S.C. 1994); *In re Burns*, 112 B.R. 763 (Bkrtcy.E.D. Va. 1990); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306(1982); *Matter of Holland*, 21 B.R. 681 (Bkrtcy N.D. Ind. 1983); *In re Claussen*, 118 B.R. 1009 (Bkrtcy D.S.D. 1990); *Matter of Garofalo's Finer Foods, Inc.*, 186 B.R. 414 (N.D. Ill. 1995); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1984).

cited by Petitioners which found post-petition transactions to be void *ab initio* nevertheless found that retroactive relief was appropriate under 11 U.S.C. § 549(c), or some other exception, thereby validating the post-petition transaction.[2]

As stated above, when the opinions cited by Petitioners are reviewed mindful of the result reached rather than the semantics used, it is clear that Petitioners have not presented a sufficient conflict among the Circuit Courts or an issue of sufficient importance to warrant review by this Court.

The United States Bankruptcy Court for the District of Nebraska well-characterized the specious nature of the issue presented herein by Petitioners in *Matter of Germer,* 107 B.R. 217 (Bkrtcy. D. Neb. 1989). In that case, the court noted that "there is a *superficial* split of authority as to whether an act in violation of the stay is void or voidable." *Id.* at 219 [emphasis added]. The court stated that some courts have held that the acts in violation of the stay were voidable, while other courts had held that acts violating the stay were void, and noted that "the differences in these lines of decisions are largely semantic." *Id.* at 220.

Those courts which have held that acts in violation of the stay are void *ab initio* expressly state that the rule is a "general rule," and many of said courts have expressed willingness to treat post-petition transactions as voidable for numerous reasons. As in the case presently before this Court, the court in *Matter of Germer, supra,* was faced with the issue of the

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2. *See Constitution Bank v. Tubbs,* 68 F.3d 685 (3rd Cir. 1995); *Franklin Savings Assoc. v. Office of Thrift Supervision,* 31 F.3d 1020 (10th Cir. 1994); *In re Lampkin,* 116 B. R. 450 (Bkrtcy D. Md. 1990), *In re Rothenberg,* 173 B.R. 4 (Bkrtcy D.D.C. 1994); *In re Schwartz,* 954 F.2d 569 (9th Cir. 1992); *In re Servico, Inc.,* 144 B. R. 933 (Bkrtcy S. D. Fla. 1992); *In re Smith Corset Shops,* 696 F.2d 971 (1st Cir. 1982).

application of § 549(c) and § 542 (c) of the Bankruptcy Code, and the Court concluded that the sale of property in violation of the stay was voidable, noting that the

> statutory scheme permits a transfer in violation of the stay to vest valid title in certain transferees. This result is inconsistent with the notion that an act in violation of the stay is void. Since valid title passes to transferees under these exceptions, it follows that the act taken in violation of the stay is voidable rather than void. This analysis is consistent with common law rules concerning distinctions between void and voidable title. When Congress intends an act in violation of a stay under the Bankruptcy Code to be void, it has no difficulty in explicitly so providing, as it has done under 11 U.S.C. § 524(a) which voids judgments on discharged debts.

Id. at 220.

Furthermore, Petitioners' characterization of the Fifth Circuit as relatively isolated with respect to its holdings regarding this issue is incorrect. For example, Petitioners characterize the Third Circuit as subscribing to the void *ab initio* school of jurisprudence, citing *Constitution Bank v. Tubbs*, 68 F.3d 685 (3rd Cir. 1995), at 692. However, before the *Constitution Bank* decision, the Third Circuit had previously considered the same issue and reached the opposite result. The Third Circuit concluded in *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994), that

> after careful consideration of the relevant

> statutory provisions of the Bankruptcy Code, we find that the Bankruptcy Court erred when it dismissed [the] motion on the basis that the foreclosure sale was void, not merely voidable. While the Court correctly articulated the general principle that any creditor action taken in violation of an automatic stay is void ab initio, [citation omitted], we find that the instant case falls within an exception to that rule.

Id. at 750. The Third Circuit further stated:

> [W]e agree with [the] contention that the inclusion of the word "unknowing" in [11 U.S.C. 362 (d)], indicates a legislative intent to apply certain types of relief retroactively and validate proceedings that would otherwise be void *ab initio.*

Id. at 751. The court noted that the Fifth Circuit has acknowledged that the power to annul authorizes the court to validate actions taken subsequent to the impressing of the § 362(a) stay, citing *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989), at 178. *Id.* Therefore, contrary to Petitioners' assertions otherwise, the Third Circuit Court of Appeals has not uniformly espoused the notion that post-petition transfers are void. Indeed, the Third Circuit cited its prior opinion in *In re Siciliano* in *Constitution Bank*, and did not overrule that decision. The Third Circuit's decisions in *In re Siciliano* and *Constitution Bank* are an excellent example of the fact that, although the Circuit Courts use various semantics, they reach the same result.

In addition, despite Petitioners' inaccurate statement to the

contrary, the Sixth Circuit has not embraced the "void *ab initio*" theory. Indeed, in *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993), erroneously cited by Petitioners as subscribing to the "void *ab initio*" theory, the Sixth Circuit Court of Appeals adopted the "voidable" school of thought. The court began its discussion of the issue by referencing the definitions of "void" and "voidable." As explained by the court,

> "[v]oid" is defined as "an instrument or transaction [that] is nugatory and ineffective so that nothing can cure it, Black's Law Dictionary 1573 (6th ed. 1990); and as that "of no legal force or effect and so incapable of confirmation or ratification." Webster's Third New International Dictionary 2562 (1971). "Voidable" is defined as "not void in itself," Black's Law Dictionary 1574 (6th ed. 1990), and as "capable of being adjudged void, invalid, and of no force," Webster's Third New International Dictionary 2562 (1971) . . . . [I]nvalid is a more appropriate adjective to use when defining an action taken against a debtor during the duration of the automatic stay . . . . [S]omething that is invalid is not incurable, in contrast to a void action which is incapable of being ratified.

Id. at 909. The court held that, to give effect to the Bankruptcy Court's statutory authority to annul a stay, post-petition actions "can only be described as invalid and voidable, since void actions are incapable of later cure or validation." *Id.* at 910. The court expressly rejected the Ninth Circuit's reasoning in *In re Schwartz, supra,* as creating "a needless legal fiction." *Id.* Finally, the *Easley* court rejected the Ninth Circuit's view, which Petitioners would have this Court adopt, that, by holding post-

petition actions voidable instead of void, courts are imposing added or undue burdens on the debtor, stating that, regardless of whether acts in violation of the stay are void or voidable, "the debtor must respond in some fashion to the action." *Id.* Moreover, numerous other courts have subscribed to the "voidable" school of jurisprudence.[3]

As stated by the Fifth Circuit in *Sikes, supra,* "the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. . . . [T]he characterization of every violation of § 362 as being absolutely void is inaccurate and overly broad." *Id.* at 178, citing *In re Fuel Oil Supply & Terminal, Inc.*, 30 B.R. 360 (Bkrtcy. N. D. Tex. 1983), at 362. As noted by the *Sikes* court, the same conclusion was reached by the Eleventh Circuit in *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984). Therefore, Petitioners' characterization of the Eleventh Circuit as uniformly espousing the "void *ab initio*" theory, by citation to *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306 (11th Cir. 1982), is simply incorrect.

In *Sikes,* the court found it instructive that the Bankruptcy

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3. *See, e.g., In re IBI Security Service, Inc.*, 158 B.R. 1 (Bkrtcy. E.D.N.Y. 1993), at 2; *In re Bresler,* 119 B.R. 400 (Bkrtcy. E.D.N.Y. 1990), at 403; *In re McGee,* 181 B.R. 307 (Bkrtcy. N.D. Ohio 1995), at 310, citing *Easley, supra; In re Huron,* 180 B.R. 496 (Bkrtcy. N.D. Ohio 1995), at 498, citing *Easley, supra; In re Brooks,* 79 B.R. 479 (9th Cir. B.A.P. 1987), at 480; *In re Clark,* 79 B.R. 723 (Bkrtcy. S.D. Ohio 1987), at 725; *In re Oliver,* 38 B.R. 245 (Bkrtcy. D. Minn. 1984), at 247-248; *In re Sports & Science, Ind., Inc.*, 95 B.R. 745 (Bkrtcy. C.D. Cal. 1989), at 747; *In re A. J. Bayless Markets, Inc.*, 108 B.R. 721 (Bkrtcy. D. Ariz. 1989), at 727; *In re Bernard,* 21 B.R. 287 (Bkrtcy. E.D. Pa. 1982), at 289; *In re McGowan,* 19 B.R. 952 (Bkrtcy. E.D. Pa. 1982), at 954; *In re Hill,* 156 B.R. 998 (Bkrtcy. E.D. Ill. 1993), at 1007; *In re Dale,* 152 B.R. 573 (Bkrtcy. D. Minn. 1993), at 579; *In re Billingsley,* 175 B.R. 286 (Bkrtcy. E.D. Ark. 1994), at 291.

Code specifically protects certain actions taken in violation of the automatic stay, noting that, under § 549, "some transactions made in violation of the stay will be deemed valid unless voided at the Trustee's discretion." *Id.* at 179. The court also noted that § 542(c) ratifies transfers by parties having no knowledge of the bankruptcy case. *Id.* As reasoned by the Fifth Circuit in *Sikes,* if everything done post-petition were void in the strict sense of the word, the statutory exceptions provided in §§ 549 and 542(c) would either be meaningless or inconsistent with the specific mandate of the automatic stay under § 362(a). The *Sikes* court cited *Collier on Bankruptcy* as a preeminent secondary authority, noting that Collier states:

> in addition to the obvious power to "terminate" the stay, [§362(d)] also gives the Bankruptcy Court the power to "annul" the stay. The difference between the two is that an order annulling the stay could operate retroactively to date of the filing of the petition which gave rise to the stay, and thus validate actions taken by party at a time when he may have been unaware of the existence of the stay. On the other hand, an order terminating the stay would be operative only from the date of its entry.

Id. at 179, citing 2 *Colliers' Bankruptcy Manual,* §362.06 (3d ed. 1983).

The Fifth Circuit, like the vast majority of the Circuit Courts of Appeals which have considered the issue, has held that Bankruptcy Courts have the authority to "annul" a stay retroactively, and such a result is properly available to claimants who are honestly ignorant of the Bankruptcy Stay. *In re Pinetree,*

Ltd., 876 F.2d 34 (5th Cir 1989), at 38.[4] A reasoned review of these opinions can only lead to the conclusion that, despite the imprecise semantics used by the Courts of Appeals, the Courts of Appeals do not disagree with respect to the results reached in cases such as the case at bar. Petitioners' attempt to obtain review by this Court by debating whether the word "void" or "voidable" should be used to describe post-petition transactions is misleading, specious, and without merit. Petitioners have not presented an irreconcilable or intolerable conflict among the Circuit Courts or an issue of sufficient importance for review by this Court, and the Court should decline Petitioners' invitation to disturb the Fifth Circuit's opinion.

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4. *Accord, see Algeran, Inc., v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir. 1985); *In re Bernard*, 21 B.R. 287 (Bkrtcy E. D. of Pa 1982); *Bronson v. United States*, 46 F.3d 1573 (Fed. Cir.); *Constitution Bk. v. Tubbs*, 68 F.3d 685 (3rd Cir. 1995); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993); *Franklin Savings Assoc. v. Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir.1994); *In re Hill*, 156 B.R. 998 (Bkrtcy N.D. of Ill. 1993); *In re Lampkin*, 116 B.R. 450 (Bkrtcy D. of Md. 1990); *In re McGowan*, 19 B.R. 952 (Bkrtcy E.D. of Pa.1982); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846 (5th Cir. 1990); *In re Rothenberg*, 173 B.R. 4 (Bkrtcy D.D.C. 1994); *In re Sapp*, 91 B.R. 520 (Bkrtcy E.D. of Mo. 1988); *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *In re Servico, Inc.*, 144 B.R. 933 (Bkrtcy S.D. of Fl. 1992); *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989); *In re Smith Corset Shops*, 696 F.2d 971 (1st Cir. 1982).

II.

THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE CASE LAW INTERPRETING 11 U.S.C. § 549(c), FINDING THAT RESPONDENTS WERE ENTITLED TO THE PROTECTION OF 11 U.S.C. § 549(c), AND THERE IS NOT SUFFICIENT CONFLICT AMONG THE CIRCUITS REGARDING THIS ISSUE TO JUSTIFY REVIEW BY THIS COURT.

Petitioners would have this Court adopt, by sweeping pronouncement, the view that a purchaser at his own foreclosure sale does not give "present fair equivalent value" as contemplated by 11 U.S.C.§ 549(c) on the ground that the Fifth Circuit chose to decide the issue under § 362(d)(2) rather than § 549(c). Petitioners assert, without any citation to controlling authority, that even if an otherwise void or voidable transaction is retroactively authorized by the court under § 362(d), the transaction must still pass the test of § 549(c) exactly as it would have been required to do had the automatic stay not been implicated in the case. Petitioners' argument that the Fifth Circuit created a false relationship between § 362 and § 549(c) is meritless, as a reasoned review of the Fifth Circuit's opinion by this Court will reveal. Like Petitioners' argument with respect to whether post-petition transactions should be declared "void" or "voidable", Petitioners' argument regarding § 549(c) is specious. The authorities cited by Respondents in their brief below, which hold that mortgagees may give "present fair equivalent value" are valid and controlling.[5]

As Petitioners state in their petition herein, statutes should be construed in harmony, rather than conflicting with each other,

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5. *In re Ward*, 837 F.2d 124 (3d Cir. 1988); *In re Bernard*, 21 B.R.287 (Bkrtcy. E.D. Pa. 1982); *In re McGowan*, 19 B.R. 952 (Bkrtcy. E.D. Pa. 1982).

so as to give meaning to each statute. *In re Hill,* 156 B.R. 998, 1007 (Bkrtcy N.D. of Ill. 1993). Petitioners would have this Court reject the Fifth Circuit's reasoning on the ground that, according to Petitioners, the court's reasoning does not give effect to both § 549(c) and § 362(d). However, despite Petitioners' assertions to the contrary, this Court is not required to accept Petitioners' argument in order to give effect to both § 549(c) and § 362(d). Contrary to Petitioners' statement concerning the Fifth Circuit's opinion, the Fifth Circuit Court of Appeals did not state that § 362(d)(2) and § 549(c) overlap. Rather, the court simply found that, because the transaction at issue in this case was retroactively authorized by the court under § 362(d), § 549(c) was not implicated because § 549(a) expressly exempts from the trustees' authority transactions which are authorized by the court.

Most significantly, Petitioners' argument overlooks this Court's recent opinion in *BFP v. Resolution Trust Corporation,* __U.S.__, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). Indeed, all of the authorities cited by Petitioners in support of their argument pre-date this Court's decision in *BFP v. Resolution Trust Corporation.* As the Court will recall, *BFP* involved an attempt to set aside a pre-petition mortgage foreclosure under 11 U.S.C. § 548, which provides that the trustee may avoid any transfer of an interest of the debtor in property that was made or incurred within one year before the date of filing the petition, if the debtor received less than a "reasonably equivalent value" in exchange for the transfer. This Court, per Justice Scalia, held that "a fair and proper price, or a 'reasonably equivalent value' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *Id.,* 114 S. Ct. at 1765. It is undisputed that the foreclosure sale at issue in the case *sub judice* was non-collusive and was conducted in accordance with the requirements of Texas law.

In addition, the Court of Appeals for the Fifth Circuit in *T. F. Stone Company, Inc. v. Harper,* 72 F.3d 466 (5th Cir. 1995), recently had occasion to consider whether this Court's decision in *BFP v. Resolution Trust Corporation* applies to the determination of whether a purchaser fits the "present fair equivalent value" requirement of 11 U.S.C. § 549(c). Citation to this case is also conspicuously absent from Petitioners' Petition for Writ of Certiorari. In that case, the Fifth Circuit noted the opinions in *In re Purnell,* 92 B.R. 625 (Bkrtcy. E.D. Pa. 1988) and *In re Briglevich,* 147 B.R. 1015 (Bkrtcy. N.D. Ga. 1992), which are cited by Petitioners, and rejected same after analyzing this Court's opinion in *BFP,* noting that

> the BFP Court's analysis of § 548 expressly eschewed any consideration of the substantive value received in a forced-sale context and instead pinned the validity of the transfer on whether the forced sale was noncollusive and conducted in compliance with state law.

T. F. Stone Company, Inc. at 469. The court began its analysis with the text of both 11 U.S.C. § 548 and § 549. The court noted that § 548 requires "reasonably equivalent value," while § 549 demands "present fair equivalent value," and held that

> we are unable . . . to perceive a meaningful difference between "reasonably" and "present fair" as applied in the context of this forced-sale case. . . . [W]e think that, in a forced-sale context, a value that is "reasonably equivalent" is also "fair equivalent," and vice versa. Indeed, the BFP Court used the words "reasonably" and "fair" in tandem, in such a manner as to belie the notion that they have different meanings.

Id. at 470. The Fifth Circuit also noted this Court's holding in *BFP* that "reasonably equivalent value" "cannot be measured by reference to 'fair market value,' since Congress could have used the language of 'fair market value' had it intended such a benchmark." *Id.* In addition, the Fifth Circuit noted that reference to the fair market value of real property is especially inappropriate in the context of a forced sale, and that any effort to ascertain what constitutes a "reasonable" or "fair" forced-sale price "requires a policy judgment that courts ought not attempt." *Id.* at 470-471. Accordingly, the Fifth Circuit concluded that the logic of *BFP* "trumps the differences between the relevant language of § 548(a)(2)(A) and § 549(c) and [sic] the contexts of mortgage foreclosure sales and tax sales." *Id.* at 471. Finally, the court pointed out that the debtor had declined to avail itself of a "critical safeguard" under § 549 when it never informed the creditor of its bankruptcy. *Id.* Petitioners herein made the same mistake, and this Court should decline to overturn the Fifth Circuit's well-reasoned decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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